August 27, 1999

Patricia Daniels, Director
Food and Nutrition Service
USDA
3101 Park Center Drive
Room 540
Alexandria, VA 22302

Re: Special Supplemental Nutrition Program for Women, Infants and Children: Food Delivery Systems; 64 Fed. Reg. 32,308 (June 16, 1999)—Regulatory Flexibility Act Certification.

Dear Ms. Daniels:

The Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration was created in 1976 to represent the views and interests of small business in federal policy making activities. [1] The Chief Counsel participates in rulemakings when he deems it necessary to ensure proper representation of small business interests. The Chief Counsel also reports to Congress annually on federal agency compliance with the Regulatory Flexibility Act (RFA),[2] and works with federal agencies to ensure that their rulemakings demonstrate an analysis of the impact that their decisions will have on small businesses.

On June 16, 1999, the Food and Nutrition Service (FNS) published the above-referenced proposed rule which would strengthen requirements for operation of vendor management systems; limitation of vendors; training requirements; criteria to be used for identifying high risk vendors; and monitoring requirements. The rule would also strengthen food instrument accountability and sanctions for participants who violate program regulations. Overall, the rule is intended to ensure greater program accountability and efficiency in food delivery and related areas, and to decrease fraud and loss of program funds. FNS certified, pursuant to the RFA, that the proposed rule would not have a significant economic impact on a substantial number of small entities because the burden of implementation would fall primarily on state agencies. FNS acknowledged that some small local agencies and vendors might be affected, but that the impact would not likely be significant.

FNS concludes that the regulation will impose the following costs: 1) an additional three hours of burden on each vendor at an average of $50 per year, 2) a curtailing of program abuse at an estimated 2% to 3% of sales annually, and 3) abusive vendors and clients will

[1] Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634a-g, 637).
[2] Regulatory Flexibility Act, 5 U.S.C. § 601, as amended by the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 866 (1996). The RFA requires federal agencies to assess and analyze the impact of their regulations on small entities and asks agencies to consider less burdensome alternatives that do not interfere with the agencies' policy or regulatory objectives.

be forced out of the program, and therefore, lose income. The primary benefit of the rule would be to reduce waste, fraud and abuse by 50%, or $25 to $50 million.

Glaringly absent from the rule is a discussion or analysis of the costs associated with limiting the number and distribution of authorized vendors who have not defrauded the government. Also absent from the rule is a description and estimate of the number of small entities that will be affected by the rule. By not addressing these essential elements, FNS has not provided any factual basis for its certification as required by the RFA.

Section 605(b) of the RFA states,

> Sections 603 and 604 of this title [concerning the preparation of an initial regulatory flexibility analysis and a final regulatory flexibility analysis, respectively] shall not apply to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. If the head of the agency makes a certification under the preceding sentence, the agency shall publish such certification in the Federal Register. . . along with a statement providing the **factual basis for such certification**. [Emphasis added.]

Implicit in the above-stated requirements, an agency must first define a "small entity"[3] and then determine whether a substantial number will be affected. There is no evidence provided in the text of the proposed rule that FNS has determined the number of small businesses and small governmental jurisdictions that are subject to the rule. Absent this information, it is not possible to draw any conclusion about whether a substantial number of small entities will be affected. An agency cannot selectively apply the requirements of the RFA. Both tests must be applied in order to certify a rule—whether a substantial number will be affected and whether there will be a significant economic impact.

As to the second part of the test, FNS has left out an important part of the analysis in determining the degree of economic impact. Not only will previously abusive vendors be knocked out of the program as FNS has indicated, legitimate vendors will also be knocked out of the program for no other reason than administrative convenience in the WIC program. FNS states, "The Department does not believe that every vendor who meets basic authorization qualifications should necessarily be authorized to accept WIC food instruments. Authorization to accept WIC food instruments must be governed by the access needs of participants and the qualifications of the vendor."[4]

The majority of state agencies deliver WIC benefits via retail stores. These stores, at least some of which are small, enjoy an increased volume of WIC-related sales as a result of participation in the WIC program. If these stores are to be disqualified from participation because there are already large chain stores adequately serving the area, it is to be expected that the small store would suffer a substantial economic impact. FNS

[3] *See* 5 U.S.C. § 601(3), (5), (6). *Also, see* The Small Business Administration's size standard regulations, 13 CFR § 121.201.
[4] 64 Fed. Reg. at 32,318.

implies that small agencies will be able to compete in rural areas where larger chains to not compete. What about the smaller retailers in direct competition with large chains?

It is quite true that WIC is not an entitlement program with unlimited resources; however, this regulation could potentially chill competition among businesses of varying sizes. Such a result runs counter to a plethora of important Administration policies that focus on the need to promote the growth and development of small businesses in the economy. These comments are not intended to suggest that FNS abandon its regulatory objectives and statutory requirements. The agency, however, is obligated by law to analyze the impact of its regulation carefully before it can assert that there will be no significant economic impact on a substantial number of small entities.

A complete and open analysis could reveal that FNS' certification may in fact be accurate, however, the agency has not provided a factual basis for its conclusions regarding the impact of the regulation. The Office of Advocacy urges FNS to re-propose the regulation with a factually-based and legally sufficient certification, or with an initial regulatory flexibility analysis containing an analysis of appropriate alternatives that could reduce the burden on small entities.

There are additional parts of the proposed rule that are not adequately supported. For instance, the importance of training in any compliance program cannot be underestimated; however, the need for annual training (including one face-to-face training session within the three-year period of the participation agreement) may not be necessary. If new technology or requirements emerge, then additional training may be needed. What are the benefits of training (in comparison with the costs) when there are no changes in the program?

In addition, FNS proposes to monitor vendors and identify high-risk vendors by having states apply a set of "high-risk vendor identification criteria" to be specified by FNS. FNS refuses to disclose publicly the actual criteria because the agency believes that disclosure would undermine their usefulness in identifying the vendors and interfere with timely changes to the criteria as knowledge about the effectiveness of various criteria increases. How do you win an ice skating competition if you do not know how you are being judged? How do you excel in school if you do not know what the teacher expects of you? How do you get a bill through Congress if you don't know the rules of procedure? FNS' approach seems inherently unfair and could lead to improper, exclusionary and even fraudulent practices on the part of some state agencies. It seems more logical that the WIC program might actually benefit from open communication with the stakeholders. .

Finally, similar revisions to the WIC program were attempted in a rulemaking about eight years ago.[5] Controversy swirled around that regulation because it was unfair and heavy-handed. The rule is now being resurrected, but some of the same problems remain. We urge you to reconsider some of the burdens associated with this proposal in relation to the actual benefit (i.e., annual training). In addition, given the significant nature and likely impact of this regulation, we urge you to grant the industry's request for an extension of

[5] *See* 55 Fed. Reg. 53,446 (Dec. 28, 1990).

time for comments—their thoughtful input may help FNS craft a less burdensome regulation that is still capable of reducing fraud, abuse and waste in the WIC program.

Thank you for your attention to this important matter. Please do not hesitate to contact our office directly if you have questions, 202-205-6533.

Sincerely,

Jere W. Glover
Chief Counsel for Advocacy

Shawne Carter McGibbon
Asst. Chief Counsel for Advocacy